



**JUDICIARY
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY (CIVIL DIVISION)
CIVIL CAUSE NO. 937 OF 2019**

BETWEEN

SAMIR DIAB CLAIMANT

-AND-

FEROZ HAROON 1st DEFENDANT

MR. SAHEER 2nd DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Kaphamtengo, of Counsel, for the Claimant

Mr. Katundu, of Counsel, for the Defendants

Mr. Henry Kachingwe, Court Clerk

RULING

Kenyatta Nyirenda, J.

This is my Ruling on an inter-partes application by the Claimant for an interlocutory injunction. The application is brought under Order 10, r. 27, of the Courts (High Court) (Civil Procedure) Rules, 2017 [Hereinafter referred to as the “CPR”].

The Claimant seeks an order of interlocutory injunction restraining the Defendants from encroaching, trespassing or otherwise interfering with the Claimant’s peaceful possession, use and occupation of his landed property title number Chitipi 19/1/199 situate at Njewa in Lilongwe until final determination of the matter or until a further order of this Court.

The application is supported by a statement, sworn by the Claimant, which reads:

- “3. ***That** on or about the 6th June 2017, I bought landed property title number Chitipi 19/1/199 situate at Njewa in Lilongwe, from one **SUPPLY NYAMBO**. Before the purchase of the property, I conducted all due diligence on the said I found that it*

*belonged to **SUPPLY NYAMBO** and the land was free from any encumbrances whatsoever. I attach hereto a copy of the Transfer of Land and mark it **SD 1***

4. ***That** after I purchased the land title number Chitipi 19/1/199, I hired a grader and cleared the said land. I further brought top soil which I bought onto the said land in order to level the land before construction.*
5. ***That** later between 2019 and early 2020, I started constructing a fence around the said plot title number Chitipi 19/1/199.*
6. ***That** however, on 3rd November 2020, when I went on my said land, I found the Defendant's agents constructing on another side of the same plot. When I contacted the Defendants, they claimed that the land was theirs.*
7. ***That** later I informed **SUPPLY NYAMBO** and we both confronted the Defendants on ownership, but the Defendants failed to produce any ownership documents over the said land. Nevertheless, the Defendants have continued to construct on the said land despite my demand that the Defendants should stop construction as the land belongs to me.*
8. ***That** the Defendants' actions are inconsistent with my peaceful and rightful occupation and use of my land. The said actions of the Defendants amount to trespass and they are illegal.*
9. ***That** I verily believe that unless stopped by an order of this court, the defendants will continue to commit trespass and deprive me my peaceful occupation of the land.*
10. ***That** I have no alternative remedy available and the only way to stop the defendants from this unreasonable conduct is by way of injunction.*
11. ***That** I undertake to pay damages in the event that this application has been granted erroneously."*

The Defendant is opposed to the application and they rely on the following statement, sworn by Farida Sikander Haji Haroon:

- "1. *THAT I am Malawian Citizen born in Malawi and holder of Malawi Passport No. MWA024757. I attach hereto a copy of my passport marked EXHIBIT FSHH 1.*
2. *THAT I am the owner of the land known as Chitipi 19/1/9.*
3. *THAT all matters deponed to in this sworn statement are unless otherwise stated based on information which I have personal knowledge of or information accessed by me during the course of my conduct of this matter the capacity above stated.*
4. *THAT I have read the sworn statement of Samir Diab and I make my response hereinafter.*

BACKGROUND

5. *THAT I recall that in the year 2008, I bought a piece of land measuring 0.64 of a Hectare as per sketch map attached marked EXHIBIT FSHH 2.*

6. *THAT I paid the sum of MK500,000.00 as the purchase price.*
7. *THAT after the payment of purchase price, I successfully processed title deed which was registered as Title No. Chitipi 19/1/9 registered as application number L223 of 2008. I attach hereto a copy of the lease marked EXHIBIT FSHH 3*
8. *THAT after the purchase and the processing of the title deed, I built a fence of 1.5m high but over a period of time the fence got dilapidated.*
9. *THAT during the month of October, 2020 I re-built the fence with bricks and cement mortar.*
10. *THAT I have built the fence in the boundary of my land under the aforesaid Title.*
11. *THAT on 25th September, 2018 I obtained a search certificate the copy of which is attached hereto marked EXHIBIT FSHH 4.*
12. *THAT I am informed that during the time I was building the fence, the Applicant come to the site and made claims to my son, Mohammed Sahil Sikandar, that the land I was building a fence was his, but his claims are wrongful.*
13. *THAT the land herein having been purchased by me in 2008, it has belonged to me from that date and as such no one else had the right to sell my land.*
14. *THAT the Claimant has been dubbed and his option is to claim back his money from the Fraudsters.*
15. *THAT one of the persons that was present during the processing of the title deeds Mr Simiyoni Kawache also known as GVH Mgwai is still available and recalls the process. I attach his witness statement marked EXHIBIT FSHH 5.*
16. *THAT from 2017 I have employed a caretaker of the land Sosten Chapsinja in the name of Simiyoni Kawache. I attach his witness statement marked EXHIBIT FSHH 6.*
17. *THAT the purchase of the land was done through my husband Sikander Dalal who has a company known as "SHAMROCK GROUP OF COMPANIES" as a result of which he is called "SHAMROCK".*
18. *THAT the construction at the site has been done through my son Mohammed Sahil Sikandar l*
19. *THAT I refer to paragraphs 3 of the Affidavit in support and I am not aware of any purchase of my land by the Claimant.*
20. *THAT it is true that at one point, I had observed some earthworks on my land but when my son tried but failed to find out who it was.*

21. *THAT I refer to paragraphs 5 of the Affidavit and honestly have never witnessed any construction works in my Plot by unknown persons.*
19. *THAT I refer to paragraphs 6 of the Affidavit and confirm that indeed i constructed a wall fence in the boarders of my land.*
20. *THAT it is true that they demanded documents from my son but I had informed my son to advise them that I had my documents and they were with me but did not have a chance to meet, discuss and show them.*
21. *THAT I have seen Exhibit SD 1, it is a title deed dated 29th April, 2017, a deed that has been processed not long ago and without my knowledge.*
22. *THAT SUPPLY NYAMBO is not the owner of the land and had no right to sell my land.*
23. *THAT any restraint to the use of my land when I have exhibited a title way back from 2008 and after I have built a wall fence would in my opinion be unjustifiable.*
24. *THAT the Claimant has been dubbed and has alternative remedies to claim for a refund of his money from SUPPLY NYAMBO.*
25. *THAT I vehemently oppose the application for the injunction."*

The sworn statement by Farida Haroon is complimented by the statement of Mr. Simiyoni Kawache, Group Village Headman Mgwai. He confirms, among other matters, that the Defendant purchased the land in dispute in 2008 and he was present when ownership documents were being processed at Traditional Authority Njewa's office in 2008.

For the Claimant, Counsel Kampamtengo submitted that this is a proper case where the Court must exercise its discretion by granting the interlocutory injunction being sought in that there is a serious question to be tried and damages would not be an adequate remedy. The relevant part of the Claimant's Skeleton Arguments state as follows:

"We contend that it is only fair that an injunction herein be granted. The Claimant herein is the legitimate owners of the land, having legitimately acquired the same. The Defendants herein have no legitimate claim to the said land in question. The conduct of the defendants in encroaching on the land is unfair and illegal as it is a violation of the Claimant's right to property. Looking at the seriousness of the question that has to be tried by the court and considering that damages may not be an adequate remedy for the Claimant, we opine that the court should grant the injunction prayed for by the Claimant because no harm would be caused to the Defendants."

On the other hand, it is the case of the Defendant that the application should be dismissed in that the Claimant has failed to satisfy the requirements of Order 10, rule 27, of the CPR and the principles in the case of **American Cyanamid Co. v. Ethicon Ltd [1975] AC, 396**. The submissions were put thus:

“Serious Question to Be Tried

- 4.2 *It is clear from the Claimant’s sworn statement in this application that the claim over the land Title Number Chitipi 19/1/99 is unsupported in any way. Although the Courts are called to avoid deciding applications for interlocutory reliefs on affidavit evidence, which is generally limited in nature, the same may be used as evidence for the seriousness of any question that may exist to be tried if the case proceeds to trial.*
- 4.3 *In the present case, the facts do not present any serious question to be tried in as much as the Claimant has presented. The claimant has instead made allegations with regards to Title Number Chitipi 19/1/99 in a frivolous and vexatious manner. In any case, our reasoned position is that under the **American Cyanamid Case** supra, it should be clearly made out on the facts as to what question the Claimant seeks the Court to answer, and it is incumbent to on him to show the particular question to be tried as espoused in **Somanje v. Somanje, Chilamwa and Stumbles, 12 M.L.R, 326***

Damages as an Adequate Remedy

- 4.4 *The Defendants herein are simply working on land that belongs to them.*
- 4.5 *It is contended that even if the Claimant were to succeed in their Claim, they will not have lost anything as there is no activity that they have carried out on the land as compared to the Defendants who are desirous of meeting their development projects in developing the land. In any case, it is the Defendants who would suffer loss if their rights were determined otherwise at this stage which loss would be difficult to quantify as compared to the Claimants.*
- 4.6 *In the present matter, the act complained of concerns the construction of a fence. In any case this is reparable and damages as argued would not be difficult to assess as the Claimant will not have lost anything. See **Woodland v Smith [1970] 1 All ER, 1091.***
- 4.7 *In the circumstances, the balance of convenience lies in favour of the Defendants and dismissing the application for an interlocutory injunction herein as they cannot be adequately compensated for any damages by halting their lawful and legitimate enjoyment of the land in question.*

Preservation of the Status Quo

- 4.8 *Where there are outstanding issues between parties pending a determination, the court seeks to maintain the status quo of the rights of the parties until such determination of the issues concerning their rights.*
- 4.9 *In the **American Cyanamid Case** supra, the Court tilted the balance of convenience in favour of Cyanamid which had already done something as compared to Ethicon which was seeking to assert a right. In any case, a party already doing something in a business sense would have lost more than a party trying to object to such a right. In any Case, if the injunction were granted herein, the Defendants would suffer more prejudice in delays and losses likely not to be quantified than the Claimant.*
- 4.10 *In the present matter, the Defendants have a subsisting right dating back as far as 2008. It is only fair that the Claimant should not interfere with or restrain the rights or affairs of Defendant until the issue is resolved. The status quo as presented by both parties is that legal title to Chitipi 19/1/99 is vested in the Defendant. The Court should maintain this and let the Defendants enjoy this right in property leaving the Claimant at liberty to prosecute his case as he is desirous.*
- 4.11 *However, in the case that the Court is of the view that the balance of convenience is evenly balanced, we submit that it should look at the affidavit evidence adduced to determine the relative strength of each party's case. We submit that whilst the Claimant has submitted a purported transfer document as evidence, which could be speculative in any case, the Defendants have submitted legal evidence of their title to Chitipi 19/1/9. Although the Courts are called to prefer against a mini trial, **Lord Diplock at page 510 of the American Cyanamid Case** supports the Defendants' position; This (weighing the parties cases), however, should be done only where it is apparent on the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party.*
- 4.12 *We submit that for the reasons above, the Defendants' have a stronger case than the Claimants and in any case the interlocutory injunction sought should not be granted.*
- 4.13 *Therefore, in so far as the purpose of an interlocutory injunction is to maintain the status quo, the Defendant submits that the same does not favour grant of the order of interlocutory injunction herein until the issue between the parties is determined.*
- 4.14. *That additionally, the Claimant has not made an undertaking as to costs should they not succeed at full trial which further speaks to the vexatious and frivolous nature of this application."*

An interlocutory injunction is a temporary and exceptional remedy which is available before the rights of the parties have been finally determined. Order 10, r.

27, of the CPR provides that a court may grant an injunction by an interlocutory order when it appears to the court that (a) there is a serious question to be tried, (b) damages may not be an adequate remedy and (c) it shall be just to do so.

Having carefully read and considered the sworn statements and the submissions by Counsel, it is very clear to me that the facts in the present case are very much in dispute. Both parties claim to be the respective owners of the land in dispute.

In light of the contestation on both factual matters and the legal questions arising therefrom, I really doubt that this case can be resolved at an interlocutory stage before the factual landscape of the case unfolds during the hearing of the substantive case: see **John Albert v. Sona Thomas (Nee Singh), Sukhdev Singh, Samsher Singh and Hellen Singh, MSCA Civil Appeal No. 46 of 2006 (unreported)**. As was aptly put in **Mwapasa and Another v. Stanbic Bank Limited and Another, HC/PR Misc. Civ. Cause No. 110 of 2003 (unreported)**, *“a court must at this stage avoid resolving complex legal questions appreciated through factual and legal issues only trial can avoid and unravel”*.

As the subject of the present case relates to real property, there is really little to say on the matter. It is trite that every piece of land is of particular and unique value to the owner and damages are an inadequate remedy and, in any case, damages would be difficult to assess: see Chitty on Contract – General Principles, 26th ed., Sweet and Maxwell at paragraph 1868 and **Village Headman Kungwa Kapinya and Others v. Chasato Estates Ltd, MSCA Civil Appeal No. 75 of 2016 (unreported)**.

As regards the balance of justice, sometimes it is best to grant an injunction so as to maintain the status quo until the trial and at other times, it is best not to impose any restraint on the respondent: see **Hubbard v. Vosper [1972] 2 Q.B. 84**. In the present case, it will be recalled that the Claimant states that he purchased the land in question on 6th June 2017. On the other hand, the Defendant holds a title deed in respect of the land in dispute and the deed was registered as far back as 2008. Further, looking at the sworn statements before the Court, it seems to me that two different pieces of land may be involved. Whilst the claim by the Claimant relates to Title No. Chitipi 19/1/199, the title documents by the Defendant pertain to Title No. Chitipi 19/1/9.

In view of the foregoing and by reason thereof, I am inclined to agree with the Defendant that the circumstances of the present matter does not favour grant of the order of interlocutory injunction. Accordingly, the application is dismissed. Costs in the cause.

Pronounced in Chambers this 22nd day of December 2020 at Lilongwe in the Republic of Malawi.



Kenyatta Nyirenda
JUDGE